No. 91-

In the
Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT SUMMERS AND ROBERT NEE,
PETITIONERS,

v.

WILLIE JOHNSON,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

ALBERT W. WALLIS*
First Assistant Corporation Counsel
JOSEPH L. TEHAN, JR.,
GERARD A. PUGSLEY,
City of Boston Law Department
City Hall — Room 615
Boston, Massachusetts 02201
(617) 725-4020

**Counsel of Record*

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. Have the arresting police officers denied medical care in violation of due process when, acting in full compliance with police department policy, they drive an apparently healthy arrestee claiming to have latent injuries directly to the police station ninety seconds away and immediately ask the duty supervisor to objectively evaluate the need for medical attention and to obtain medical care if it is determined to be necessary?

II. What is the standard of causation required in a denial of medical care case brought under 42 U.S.C. § 1983?

III. Did the State Court correctly apply the doctrine of qualified immunity in holding that petitioners had the burden of proving an "extraordinary circumstance" as a result of which they neither knew nor should have known that their conduct was unlawful?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (cont.)

***Constitutional Provisions*:**

No. 91-

In the

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT SUMMERS AND ROBERT NEE,
PETITIONERS,

v.

WILLIE JOHNSON,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 411 Mass. 82 (1991) and is reproduced as Appendix A hereto (App. A. at 1a-13a).

JURISDICTION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, affirming a Superior Court jury verdict against the petitioners, was entered on September 4, 1991. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII to the Constitution of the United States:

> Bail — Punishment
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV to the Constitution of the United States:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> § 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec.29, 1979, P.L. 96-170; § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

Police Officers Summers and Nee, petitioners, lawfully arrested the respondent during the early morning of July 21, 1981 for attempting to break and enter a woman's apartment. This case arises out of the respondent's claim that, although he exhibited no external sign of serious injury, his due process rights were violated by the petitioners when they took him to the police station immediately rather than detouring to some medical facility.

Summers and Nee are Boston Police Officers with an aggregate of more than thirty years of law enforcement experience. On July 21, 1981 the petitioners were partners in a two-man patrol car. They were responsible that night for answering "priority one" calls, involving such crimes as shootings, stabbings or rapes. While on patrol, shortly after midnight, the officers overheard a radio call from their dispatcher to another patrol car concerning a breaking and entering in progress. Although the call did not specifically request their assistance, in accordance with department procedures the petitioners "in-

tercepted" it, voluntarily responding due to their proximity to the scene and to the serious nature of the call.

Petitioners arrived at the three-family house and proceeded to the apartment on the second floor. Upon arrival at the second floor, the petitioners came upon the respondent who was outside the apartment with a hammer in his hand. The apartment door had been smashed and lay off its frame. The occupant of the apartment, Earline Guins, told the petitioners that the respondent had broken into her apartment.

Petitioner Summers, based on his experience, evaluated the situation as a lover's quarrel, and requested that the respondent leave. The respondent refused to do so. Petitioner Summers repeated his request. The respondent still would not leave. At that point, Ms. Guins asserted that the respondent had attempted to rape her. Presented with this charge, and having found the respondent in front of the smashed apartment door with a hammer in his hand, petitioner Summers felt that he had no alternative but to arrest the respondent at that point and take him to the police station to be booked.[1]

While still on the second floor landing outside of Ms. Guins' apartment, Petitioner Summers proceeded to handcuff the respondent. This landing was tiny, approximately 4′x4′. The respondent, who had been drinking, struggled during the arrest.

As petitioner Summers applied the handcuffs, the respondent, who was at the very edge of the stairs, spun around, planting his left foot. Due to the small confines, his foot missed the landing, causing him to lose his balance. Summers lost his grasp on the handcuffs, and the respondent fell down the stairs.

The petitioners went to the bottom of the interior stairs and started to assist the respondent by lifting him up under his arm-

[1] At the trial of this action, Ms. Guins admitted to being the respondent's girlfriend. She also admitted that the rape charge was a lie.

pits. He was not limping at this point, and in fact struggled with the petitioners to free himself from their grasp. The petitioners slipped as they brought him outside on the porch, which was rainslicked. The respondent was able to free himself, jump down the flight of exterior stairs from the porch to the sidewalk and land heavily on the sidewalk. He then lost his balance and fell to his knees. Within moments the petitioners were again at his side and the respondent, back in their custody, was threatening to sue the police.

In the petitioners' extensive experience, complaints of injury during arrest are commonplace and the respondent then complained of knee pain. The petitioners could detect no injury to or blood on the respondent's knee. Respondent's sole observable injury was a facial scrape mark. Accordingly, the petitioners determined that they should act in conformance with official Boston Police Department policy as embodied in Rule 318, (App. B at 14a) This rule requires that all arrestees be brought directly to the police station for booking, where the duty supervisor is to evaluate the arrestee for injuries. The purpose of this rule is to ensure that an arrestee's claim of injury is objectively evaluated by a superior officer who was not involved in the arrest and, if necessary, to provide for appropriate treatment of legitimate injuries.[2]

Petitioners proceeded directly to Boston Police Department Area C station which was only one-half mile from the locus of arrest. The trip took only about ninety seconds.

Respondent was then booked, and petitioners informed the duty supervisor of respondent's claimed injuries, which were thereafter noted on the arrest sheet (App. C at 25a). The respondent was then placed in a cell. Petitioner Summers then filled

[2] The petitioners acknowledged at trial that had the respondent presented with serious visible injury such as a stab or gunshot wound, they would have sought clearance from their superiors via radio to call an ambulance to bring him directly to a hospital.

out a police incident report, arrest report and application for complaint in Dorchester District Court.

The respondent's arrest occurred at approximately 12:40 A.M. Booking was completed and the respondent placed in the custody of the duty supervisor by 12:57 A.M. Petitioners Summers and Nee went off duty at 1:00 A.M. Pursuant to Boston Police Department Rule 318, custody of prisoners and responsibility for securing medical attention for injured prisoners rests with the duty supervisor at the time of booking and thereafter. The duty supervisor evaluated the respondent's condition and, in light of his continuing complaint of pain, made arrangements for respondent's medical treatment at Boston City Hospital within approximately forty-five minutes after the arrest. A transport vehicle was obtained and, at approximately 3:18 A.M. the respondent was admitted to the hospital.

After a medical examination, physicians diagnosed a tibial fracture, patellar fracture, laceration of popliteal artery and compartment syndrome. The respondent's orthopedic expert testified that all of his injuries occurred at the time of his arrest. Subsequent surgeries were performed, including arthrodesis, or knee fusion, which left the respondent without knee flexion as a medical end point. The respondent's medical course was complicated by his subsequent non-compliance with treatment recommendations of the Boston City Hospital orthopedic staff.[3] No evidence whatsoever was adduced to establish that any delay in treatment attributable to the petitioners caused injury to the respondent.

The respondent initiated this action in Massachusetts Suffolk Superior Court on July 20, 1983. The original complaint named as defendants the petitioners, their supervising officers, and the City of Boston. Respondent did not sue the duty supervisor. The complaint alleged federal civil rights claims of excessive

[3]The respondent refused his doctors' subsequent recommended surgery directed at restoring flexibility to his knee.

force and delay of necessary medical care, violation of the Massachusetts Civil Rights Act, M.G.L. c. 12, §§ 11H and I, and state tort claims of assault and battery, malicious prosecution and negligence.

Pursuant to the petitioners' motion, trial was bifurcated with the trial of the petitioners to proceed first, with trial of the remaining defendants, if necessary, to follow immediately with the same jury.

Trial of the action, as against petitioners only, commenced on March 28, 1988. At the close of the respondent's case, the petitioners filed motions for directed verdict, which were denied. These motions were renewed at the close of all evidence on March 31, 1988, and were again denied.

The case was submitted to the jury via special verdict questions pursuant to Mass. R. Civ. P. 49. On April 4, 1988, after several days of deliberations, the jury returned its verdict, exonerating the petitioners from all claims of excessive force, assault and battery, and state civil rights violations. The jury returned a verdict for the respondent on his claim for denial of medical care only, and awarded damages in the amount of $385,000.[4] All claims as against all remaining defendants were thereafter dismissed pursuant to stipulation. The stipulation preserved petitioners' right to appeal.

On April 22, 1988, the petitioners filed a joint motion for judgment notwithstanding the verdict and/or in the alternative, for a new trial, which motion was denied. The petitioners thereafter filed a timely appeal. They asserted, inter alia, that the respondent had failed to introduce sufficient evidence of deliberate indifference to serious medical needs to withstand petitioners' motion for a directed verdict on his denial of medical care claim. They further asserted both that they had been improperly deprived of the defense of qualified immunity, and

[4] Approximately $1,000,000 dollars with interest and fees today.

that the respondent had failed to establish that any delay in the provision of medical care for which they were responsible was the proximate cause of his injuries. Finally, petitioners argued that the need for effective law enforcement dictated reversal of the verdict on public policy grounds, since that verdict, if allowed to stand, would hold police officers liable for any failure to seek immediate hospitalization every time an arrestee claimed injury, even if such injury were invisible.

The State Court granted direct appellate review sua sponte. On September 4, 1991, in a sharply divided 4-3 decision, it affirmed the Superior Court verdict. The dissent noted that: "[t]here in not a trace of evidence in the record suggesting that delay in providing medical care to the [respondent] caused him to be crippled," and that "[g]iven the [respondent's] absolute failure to introduce any evidence establishing a causal link between the [petitioners'] conduct and the [respondent's] worsened condition, the [petitioners] were entitled to a directed verdict or judgment notwithstanding the verdict." (App. A at 9a-10a.) The dissent further noted that "[i]nferences drawn from the evidence must be based on probabilities, not possibilities. . . . That is, inferences may not be drawn 'from the realm of mere speculation and conjecture.' . . . Contrary to this standard, today's ruling endorses an attenuated inference lacking an essential factual predicate." (App. A at 11a.) This petition now follows.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE STATE COURT CONFLICTS WITH CONTROLLING FEDERAL COURT PRECEDENT ESTABLISHING THE REQUISITE ELEMENTS FOR RECOVERY ON A DENIAL OF MEDICAL CARE CLAIM PURSUANT TO 42 U.S.C. § 1983.

A. *The Decision of the State Court Conflicts with Federal Court Precedent Defining Actionable Misconduct in a Denial of Medical Assistance Claim Pursuant to 42 U.S.C. § 1983.*

The State Court has established a new constitutional standard which law enforcement officials must meet in denial of medical care cases involving those whom they have just arrested. Police officers will be held strictly liable for failing to act as if an arrestee claiming to be hurt were seriously injured even if there is no visible injury and even if the police officers, following official policy, report the arrestee's claim of injury to their supervisor within minutes of the claim being made.

The State Court cited the appropriate decisions of this Court which establish that "deliberate indifference to serious medical needs" is a requisite element for recovery on a denial of medical assistance claim. However, the State Court then reached its decision with disregard for the holdings of those cases. Instead, the State Court determined, contrary to that precedent and without a shred of evidentiary basis, that "the jury could have found that the police knew of the plaintiff's injuries, their severity, and the need for prompt medical care, . . ." (App. A at 6a-7a n.5.)

In *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976), involving a prisoner's claims of denial of medical assistance, this Court held that judicial review was to be undertaken pursuant to an Eighth Amendment analysis, as to whether the conduct com-

plained of constituted "cruel and unusual" punishment. The Court further held that in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence "deliberate indifference to serious medical needs," or a "wanton infliction of pain," and that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner."[5] Governmental mistreatment of those in its custody must "shock the conscience" of contemporary society in order to become actionable. *Rochin* v. *California*, 342 U.S. 165 (1952).

A pre-trial detainee's right to appropriate and timely medical care, conferred pursuant to the Fourteenth Amendment, has been held by this Court to be at least as great as that of a prisoner. *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979), *Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). This Court has not subsequently addressed in further detail the extent and contour of this due process protection. The Circuit Courts of Appeal which have addressed this issue have uniformly applied a "deliberate indifference to serious medical needs" standard in cases involving pre-trial detainees subsequent to the Court's decision in *Revere* v. *Massachusetts General Hospital*. The State Court, however, in conflict with *Revere*, has established a new standard whereby law enforcement officers are to be strictly liable for denial of medical care even when the detainee's claimed injury is latent and its seriousness only later ascertainable, and even when, notwithstanding the lack of apparent injury, the officers reported the injury claim to their supervisor within minutes of the claim having been made as was required by official Police Department policy.

[5] The issue of whether the conduct of the petitioners in addressing respondents' medical needs was negligent was never addressed, as the respondent waived such claims, governed by M.G.L. c. 258 with its attendant $100,000 cap on recovery, electing to pursue only his constitutional claims, upon which no damages cap is imposed, and which provide for the award of attorney's fees and expenses. In this instance, fees and expenses in the amount of $80,203.36 were awarded by the State Court pursuant to 42 U.S.C. § 1988.

Having tampered with the standard of liability established by this Court, the State Court then utilized the lowest possible standard of proof to reach its conclusion that petitioners were liable for violating respondent's constitutional rights.

Lower federal court decisions concerning denial of medical care claims have consistently set a high threshhold of proof for recovery under the "deliberate indifference" standard established by this Court in *Estelle*. In *Carapelluci* v. *Town of Winchester*, 707 F.Supp. 611, 615 (D.Mass. 1989), the "deliberate indifference" standard was held to require "at least evidence sufficient to support an inference as to the subjective state of mind of the defendants." Proof of "acts or omissions so dangerous (in respect to health or safety) that a defendant's 'knowledge of [a large] . . . risk can be inferred" is a condition precedent to recovery. *Cortes Quinones* v. *Jiminez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 68 (1989), quoting *Duckworth* v. *Frangen*, 780 F.2d 645, 652 (7th Cir. 1985).

In *Sires* v. *Berman*, 834 F.2d 9 (1st Cir. 1987), the First Circuit Court of Appeals further clarified a plaintiff's burden on a denial of medical care claim, interjecting the requirement of proving intent to harm on the part of the defendants. "[H]e must show serious medical need, and he must prove the defendant's purposeful indifference thereto." *Id.* at 12. The Court held that the conduct complained of in *Sires*, involving failure to apply nitropaste to treat a prisoner's serious heart condition, did not "shock the conscience, let alone that any deficiency was intentional," in finding for the defendant.

The petitioners' conduct in this case could hardly be said to be intentionally indifferent, let alone shocking to the conscience. They were confronted with an arrestee, the respondent, who had done everything he could to evade their control. He had refused their repeated requests to leave the scene. He had struggled to avoid arrest. He had escaped from their arrest.

He had threatened to sue them. When all of these avenues of escape were closed to him, and he was about to be brought to the police station to be booked, he claimed to be injured, and began to limp.

Notwithstanding their experiences preceding the respondent's claim that he was hurt, petitioners assessed his physical condition. Aside from an inconsequential facial scratch and the limp, the external evidence was unequivocal that there was no injury.

Respondent had been well enough after his initial fall to struggle free of the petitioners. Petitioners, themselves, had fallen down the second flight of stairs with the respondent and they had suffered no injury. Petitioners were not deliberately indifferent to respondent's condition. They evaluated it in the context of events and concluded that it did not present a basis for their deviating from official Boston Police Department policy.

Consistent with that policy, they made the ninety second trip to the police station and reported the respondent's claim of injury to the duty supervisor, who then took responsibility for objectively evaluating the respondent's claims and addressing them as appropriate.

The State Court, however, reached to hold the petitioners liable[6] for denying medical care for injuries which were unknown to them and which only became apparent later, after they no longer had custody of the respondent and, which, following a course of medical treatment which included respondent's refusal to follow his doctor's recommendations, proved to be very serious. To reach this conclusion, the State Court had to ignore the decisions of this Court in *Estelle* and *Revere* and subsequent lower federal court decisions. The State Court's

[6] It is perhaps significant that the booking officer who took responsibility for respondent's medical needs within minutes of the arrest was not sued by the respondent.

determination that the jury could have found that the petitioners knew of the severity of the respondent's injury is belied by the testimony of the petitioners and by the medical evidence adduced in this case.

Thus, the decision of the State Court conflicts with the holding and progeny of *Estelle*, *Bell* and *Revere*. This Court should therefore grant the petition for certiorari in order to define explicitly the extent and contours of the due process obligation of law enforcement officials to arrestees or pretrial detainees. The answer to this question is of considerable importance to effective law enforcement administration.

B. *The Decision of the State Court Establishes An Incorrect Standard of Causation in Denial of Medical Care Cases Pursuant to 42 U.S.C. § 1983.*

This Court has held that 42 U.S.C. § 1983 "creates a species of tort liability." *Imbler* v. *Pachtam*, 424 U.S. 409, 417 (1976). The constitutional claim of denial of medical assistance is therefore a quasi-tort action. Accordingly, all elements of the underlying tort action, including proximate cause, must be shown. *Daniels* v. *Gilbreath*, 668 F.2d 477 (10th Cir. 1982); *McClelland* v. *Facteau*, 610 F.2d 693 (10th Cir. 1979); *Arnold* v. *International Business Machine Corp.*, 637 F.2d 1350 (9th Cir. 1981); *Carey* v. *Piphus*, 435 U.S. 247 (1978); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The language of § 1983 "plainly requires proof of an affirmative causal connection between the action taken by a particular person" under color of state law "and the constitutional deprivation." *Williams* v. *Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982). The showing necessary to establish proximate cause under § 1983 may be even more demanding than under state law. *Martinez* v. *California*, 444 U.S. 277, 285 (1980). "[I]nquiry into causation must be a directed one, focusing on

the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams* v. *Bennett*, 689 F.2d at 1381.

The State Court employed a "substantial factor" test to determine that the the petitioners' conduct caused respondent's injuries, stating: "A plaintiff need only show 'that there was a greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.'" (App. A at 7a.)

While this Court has not expressly defined the standard of causation in a denial of medical care claim pursuant to 42 U.S.C. § 1983, petitioners submit that this "substantial factor" test is inherently vague and, as applied by the State Court, in effect establishes a presumption of liability unless every arrestee claiming latent injury is immediately hospitalized.

In this case, the medical evidence, adduced through respondent's orthopedic expert, established that the respondent's fracture injuries were causally related to a "high velocity injury coming across the entire leg and delivered to the knee causing the fracture, the artery laceration, and the patellar fracture." The expert further noted that the respondent's artery laceration "occurred at the time of the original injury" and "was caused by fracture and dislocation of the knee joint." The jury exonerated the petitioners for the injuries caused at the arrest site.[7]

No evidence whatsoever was introduced that any delay for which the petitioners were responsible constituted the proximate cause of the respondent's injuries. Nonetheless, the State Court resorted to an attenuated application of *Restatement of Torts* "substantial factor" principles to affirm the respondent's verdict.

---

[7] Curiously, the State Court speculated that the jury could have found that the respondent (who was struggling to resist arrest and who leapt away from the police officers) was shoved down the stairs by the petitioners, notwithstanding the jury's unambiguous verdict to the contrary.

The magnitude of the State Court's error is articulately set forth in the scathing dissent of three of its justices. "There is not a trace of evidence in the record suggesting that delay in providing medical care to the [respondent] caused him to be crippled. . . . [G]iven the [respondent's] absolute failure to introduce any evidence establishing a causal link between the [petitioners'] conduct and the [respondent's] worsened condition, the [petitioners] were entitled to a directed verdict or judgment notwithstanding the verdict." Further, the dissent said that "inferences may not be drawn 'from the realm of mere speculation and conjecture,'" . . . and that ". . . [c]ontrary to this standard, today's ruling endorses an attenuated inference lacking an essential factual predicate." (App. A at 9a-10a, 11a.) The three dissenting justices concluded that "[a]lthough one may infer that the [respondent] would have obtained medical care sooner if the [petitioners] had taken him directly to the hospital, there was no evidence to suggest that the treatment rendered at that unknown earlier time would have been any more effective. . . . The [respondent] failed to offer *any* evidence suggesting that the period of delay for which the [petitioners] were arguably responsible, from 12:30 to 1:00 A.M., caused the [respondent's] condition to worsen." (App. A at 12a, 13a.) As such, the respondent's injury is "too remote a consequence" of the petitioners' actions to hold them liable. *See Martinez* v. *California*, *supra* at 285. Further, there was no evidence establishing that the petitioners could have "foreseen the turn of events . . . (in terms of the severity of the respondent's injury) and prevented them." *See Daniels* v. *Gilbreath*, *supra*.

The effect of the State Court's decision is to establish a presumption that any failure to secure immediate medical treatment for any claimed injury constitutes the proximate cause of that injury. This Court should grant certiorari in order to precisely define the standard of causation to be applied in denial of medical care cases pursuant to 42 U.S.C. § 1983.

C. *The Decision of the State Court Incorrectly Applies the Doctrine of Qualified Immunity.*

This Court, in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) established a test of objective reasonableness to determine if a government official is entitled to the defense of qualified immunity:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory and constitutional rights of which a reasonable person would have known.

Harlow, *supra* at 818.

This test has two prongs: The first is that the right must be clearly established. The second is that a reasonable person would have known that the right exists.

The second prong of this test has been further defined by this Court in the context of a police search of a home. When determining whether an officer is entitled to the qualified immunity defense, the court is required to examine the information possessed by the officer at the time of the incident giving rise to suit against the involved officials. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987).

This Court set forth the required inquiry as follows:

> The relevant questions in this case, . . . is the objective . . . question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in the light of clearly established law and the information the searching officers possessed.

Anderson, *supra* at 641.

In determining petitioners' liability in this case, the State Court simply failed to apply the second prong of the qualified

immunity test. It correctly determined the first prong of the test, that the respondent had a constitutional right to receive medical treatment for a serious medical need. However, the second prong of the test required that the State Court next consider the information possessed by the petitioners at the time of the respondent's arrest concerning the existence or severity of respondent's claimed injuries and then evaluate their actions in the light of clearly established law. This it failed to do.

Specifically, the information possessed by the petitioners was that the respondent, holding a hammer in front of a smashed apartment door, was being accused of breaking and entering and of rape by the woman occupying that apartment. The respondent had refused to comply with their requests, had struggled to resist arrest, and had threatened to sue them as they were preparing to take him for booking. Although the respondent claimed to be injured, there was no visible injury except for a facial scrape mark. The respondent's medical records and the medical testimony adduced at trial corroborate that all injuries were internal. Petitioners had also fallen down a flight of stairs at the scene of the arrest and were uninjured. Petitioners were also governed by Police Department regulation (Rule 318) which required that all arrestees claiming injury be transported immediately to the police station where the arrestee's medical condition would be evaluated by a superior officer. They knew that the police station was only half a mile away.

The issue which the State Court should have considered, therefore, is whether a reasonable person could have believed that transporting the respondent, who claimed, but displayed no visible injuries, directly to the district station as required by departmental regulations, was lawful or whether a reasonable person in petitioners' situation should have known that respondent had injuries so severe as to justify disregarding official Police Department policy.

The State Court, therefore, in failing to apply the second prong of the qualified immunity test, as set forth in *Harlow* and explained in *Anderson*, wrongfully denied the petitioners their entitled defense of qualified immunity.

Further, instead of applying a standard of objective reasonableness, the State Court required the petitioners to "prove that (through 'extraordinary circumstances') [they] neither knew nor should have known of the relevant legal standard." This new standard conflicts with the standard of reasonableness established by this Court and adopted by the First Circuit Court of Appeals. *See B.C.R. Transport Co., Inc.* v. *Fontaine*, 727 F.2d 7 (1st Cir. 1984). This issue is of broader impact than in this case alone, since the standard applied by the State Court undermines a police officer's proper reliance on compliance with departmental regulations. As a practical matter, the standard adopted by the State Court all but strips public officials of the defense of qualified immunity, leaving them exposed, as in this case, to extensive personal liability even if they act reasonably in light of the circumstances known to them.

CONCLUSION

This Court should grant the petition for certiorari as the State Court has created standards of police officer liability in denial of medical care cases under 42 U.S.C. § 1983 which are at odds with this Court's decisions and because it is critical to effective law enforcement administration that such standards be clear and consistent.

Respectfully submitted,

ALBERT W. WALLIS*
JOSEPH L. TEHAN, JR.
GERARD A. PUGSLEY,
City of Boston Law Department
City Hall — Room 615
Boston, Massachusetts 02201
(617) 725-4020

**Counsel of Record*

December 2, 1991

TABLE OF CONTENTS.

WILLIE JOHNSON *vs.* ROBERT SUMMERS & another.[1]

Suffolk. March 6, 1991. - September 4, 1991.

Present: LIACOS, C.J., WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR, & GREANEY, JJ.

Civil Rights, Availability of remedy. *Due Process of Law*, Substantive rights, Police custody. *Constitutional Law*, Cruel and unusual punishment. *Proximate Cause*. *Negligence*, Police. *Regulation*. *Police*, Regulations.

In an action against two police officers seeking recovery under 42 U.S.C. § 1983 (1988) for violation of the plaintiff's civil rights, alleging that, while the plaintiff was in police custody, the defendants improperly delayed in providing him necessary medical assistance, there was sufficient evidence to permit the jury to find that certain police department regulations did not relieve the defendants of any constitutional obligation to attend to the plaintiff's serious medical needs, and that the defendants were purposefully indifferent to those serious medical needs in violation of the plaintiff's rights to substantive due process of law under the Fourteenth Amendment to the United States Constitution. [86-87]

In an action against two police officers seeking recovery under 42 U.S.C. § 1983 (1988) for violation of the plaintiff's civil rights, alleging that, while the plaintiff was in police custody, the defendants improperly delayed in providing him necessary medical assistance, there was sufficient evidence to permit the jury's inferring and finding that the defendants' failure to bring the plaintiff directly to a hospital increased the likelihood that his serious injuries would be exacerbated, and that the defendants' conduct was a substantial factor in causing harm to the plaintiff. [88-89] LYNCH, J., dissenting, with whom NOLAN, & O'CONNOR, JJ., joined.

In an action against two police officers seeking recovery under 42 U.S.C. § 1983 (1988) for violation of the plaintiff's civil rights, alleging that, while the plaintiff was in police custody, the defendants improperly delayed in providing him necessary medical assistance, the defendants failed to meet their burden of proving the extraordinary circumstances required to entitle them to qualified immunity from suit. [89-90]

[1]Robert Nee.

CIVIL ACTION commenced in the Superior Court Department on July 20, 1983.

The case was tried before *Barbara J. Rouse*, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Joseph L. Tehan, Jr., Assistant Corporation Counsel (*Gerard A. Pugsley*, Assistant Corporation Counsel, with him) for the defendants.

Carmen L. Durso (*Mark F. Itzkowitz* with him) for the plaintiff.

WILKINS, J. The defendants, Robert Summers and Robert Nee, Boston police officers, appeal following a Superior Court jury verdict awarding damages to the plaintiff Johnson under 42 U.S.C. § 1983 (1988), for the violation of Johnson's civil rights. In answer to special questions (Mass. R. Civ. P. 49, 365 Mass. 812 [1974]), the jury found that the defendants did not use excessive force or violate Johnson's constitutional rights in arresting him, but that, while Johnson was in police custody, the two officers improperly delayed in providing him necessary medical assistance. The judge denied the defendants' motions for a directed verdict and later denied their motion for judgment notwithstanding the verdict. In their appeal, which we transferred here, the defendants argue that the evidence warranted neither a finding that they violated Johnson's Federal constitutional rights nor a finding that their conduct caused Johnson's injuries. They also argue that they were entitled to immunity from suit. We affirm the judgment.

There was evidence from which the jury could have found the following. About 12:30 A.M. on July 21, 1981, Summers and Nee arrested Johnson at a three-family house in the Dorchester section of Boston where Johnson's girl friend lived.[2] At that time Johnson and Summers were standing on

[2]Johnson was arrested outside the door to his girl friend's apartment where he had been visiting that evening. After Johnson had left the apartment briefly, his girl friend locked him out of the apartment because, she testified, she wanted to go to sleep. Johnson forced the door open to retrieve belongings that he had left in the apartment. The girl friend notified

the second-floor landing, while Nee stood on the staircase four steps below the second floor. After Summers handcuffed Johnson, Johnson either was shoved (according to his own testimony) or fell (according to Summers's and Nee's testimony) down the staircase to the first floor. Johnson testified that he could not stand up after the fall and that he told the officers that they "broke [his] leg." Summers and Nee then picked Johnson up off the floor and dragged him out to the front porch. There Johnson again was shoved or slipped down a shorter flight of stairs to the sidewalk. Johnson testified that, as he lay on the sidewalk, he complained to the officers that he was in pain, could not stand up, and asked to be taken to a doctor. Summers and Nee dragged him to their cruiser and drove him approximately one-half mile to the police station.

As he was being removed from the cruiser at the station, Johnson again complained of pain in his leg and asked to be taken to a doctor. Summers and Nee dragged Johnson into the station, where he was placed in a cell and booked. Summers and Nee informed the booking officer of Johnson's injury. The officers then filled out the necessary reports and, their shift being over, went off duty at 1 A.M.

Some time later, another officer heard Johnson yelling in his cell and arranged for him to be taken to Boston City Hospital, where he arrived at 3:18 A.M. Johnson had a laceration to his right popliteal artery, the major artery to the lower leg, and a very severely comminuted fracture of the top of the tibia of his right leg. The laceration was caused by one or both of his falls. About 7:15 A.M. Johnson had an emergency operation because the lower leg can survive the loss of

the police of a breaking and entering, and, when officers Summers and Nee arrived, she also said that Johnson had attempted to rape her. The officers arrested Johnson. In an application for a criminal complaint in the District Court, Summers charged Johnson only with attempted breaking and entering. Johnson's girl friend admitted during the trial of this case that the accusation of rape was a fabrication. Johnson was convicted at a bench trial in Dorchester District Court of attempted breaking and entering, and claimed a jury trial. In the jury session the case was dismissed.

circulation for no more than approximately eight hours. The surgeons tried to repair the artery with a piece of vein from Johnson's left groin but were not able to obtain a good flow of blood. They then used a synthetic graft which was successful. Blood flow was restored about one hour after the operation began.

Because the blood flow to Johnson's lower leg had been shut off for approximately eight hours, the calf of this leg became massively swollen as new blood came into it. Special attention was given to the consequences of the swelling by slitting the tissues overlaying the swollen muscles, causing large open wounds on the front of his calf. At that point, the vascular surgeons consulted with the orthopedic surgeons and decided that any attempt to repair the tibia would seriously affect the artery.

Johnson had postoperative problems. Some of the skin grafts to cover the sites of the surgical wounds to his calf became infected. Because it was important to do so, the orthopedic surgeons had hoped to operate on Johnson promptly. The infections, however, delayed the operation on the tibia. On August 21, surgeons attempted a closed reduction of the fracture by manipulation but were not successful. An open reduction and internal fixation was no longer an available option because the bones had healed in an abnormal position. In October, Johnson had a knee fusion with the result that he can no longer flex his knee.

The jury found Summers and Nee liable in damages for the delay in providing medical care.[3] As we have said, the jury rejected Johnson's allegations that Summers and Nee used excessive force or assaulted and beat him. We, therefore, confine our analysis to the finding that the officers denied Johnson his civil rights by failing to provide him with medical care promptly.

[3]Johnson's complaint also named as defendants Summers's and Nee's supervising officers in the Boston police department and the city of Boston. A stipulation of dismissal without prejudice as to those defendants was filed after the trial of the claims against Summers and Nee.

The standard of review is whether, viewing the evidence in the light most favorable to the plaintiff, "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff." *Miga* v. *Holyoke*, 398 Mass. 343, 348 (1986). *Poirier* v. *Plymouth*, 374 Mass. 206, 212 (1978), quoting *Raunela* v. *Hertz Corp.*, 361 Mass. 341, 343 (1972).

1. A § 1983 plaintiff must demonstrate that (1) a person acting under color of State law committed the conduct complained of and (2) the conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981). Summers and Nee were acting under color of law when they arrested Johnson, and they do not contend otherwise. Our inquiry focuses on whether the jury could reasonably have concluded that the defendants' conduct deprived Johnson of a federally protected right, privilege, or immunity.

The United States Supreme Court has held that "deliberate indifference to serious medical needs" of convicted prisoners violates the proscription of cruel and unusual punishment stated in the Eighth Amendment to the United States Constitution. *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976). That Court has also held that the constitutional rights of pretrial detainees are at least as broad as those afforded convicted prisoners. See *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979); *Miga* v. *Holyoke*, *supra* at 350-351. A detainee's Fourteenth Amendment due process right to medical care, therefore, is at least as great as the corresponding Eighth Amendment right of a prisoner. See *Revere* v. *Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). See also *Miga* v. *Holyoke*, *supra* at 350-351. Thus, if a detainee establishes the "deliberate indifference to serious medical needs" that would constitute a violation of a prisoner's Eighth Amendment rights, he has necessarily shown conduct sufficiently culpable to constitute a violation of his due process rights.

The jury heard conflicting evidence as to the meaning of certain regulations of the Boston police department. In arguing that they violated no duty to Johnson, the defendants highlight portions of those regulations which, they claimed, required them to take Johnson directly to the station house without regard to his condition, and thereby relieved them of any responsibility for Johnson's medical needs. Other portions of the regulations, also before the jury, instead held the defendants "strictly responsible" for the plaintiff's well-being. Both defendants conceded that, at least in the case of serious, "visible" wounds, they would have had the discretion to take the plaintiff first to a hospital. Without passing on the relevancy of these regulations as to the existence of any duty under § 1983, we note that the jury would have been warranted in finding that, on these facts, the regulations did not relieve the defendants of any constitutional obligation to attend to the plaintiff's serious medical needs. See *Hall* v. *Ochs*, 817 F.2d 920, 925 n.2 (1st Cir. 1987). We shall return to these regulations when we discuss the defendants' claims of immunity.

There was sufficient evidence from which the jury could conclude that Summers and Nee were purposefully indifferent to Johnson's serious medical needs.[4] The officers saw Johnson fall down two flights of stairs. He repeatedly made complaints about pain in his knee and requested medical attention several times. Johnson testified that he could not walk at all after the falls, an assertion that was bolstered by evidence that Johnson had broken his leg and severed an important artery. The officers themselves admitted that Johnson was unable to walk after his falls. The evidence warranted the jury's finding that the defendants wilfully or intentionally denied Johnson necessary medical care.[5]

[4]The defendants do not complain that the judge's charge allowed the jury to find them liable on some lesser standard of culpability.

[5]We note that, as the jury could have viewed the evidence, this is not a case in which police officers are being called to task for their negligent failure accurately to assess a latent physical ailment of unknown severity. Instead, the jury could have found that the police knew of the plaintiff's

2. We turn, therefore, to the causation issue. The Supreme Court has stated that § 1983 "creates a species of tort liability," *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), and that actions under the statute generally are governed by common law tort principles. See *Carey* v. *Piphus*, 435 U.S. 247, 257-259 (1978); *Imbler* v. *Pachtman*, *supra*. But see *Martinez* v. *California*, 444 U.S. 277, 285 (1980) (showing required to establish proximate cause under § 1983 may be more demanding than under State law). Accordingly, a showing of proximate causation is a necessary element in a § 1983 action. See *Daniels* v. *Gilbreath*, 668 F.2d 477, 480-481 (10th Cir. 1982); *Arnold* v. *International Business Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). The defendants argue that there was no evidence from which the jury could have concluded that any delay attributable to them in providing medical care proximately caused or exacerbated his injuries. We disagree.

The question of causation is ordinarily for the jury. *Zezuski* v. *Jenny Mfg. Co.*, 363 Mass. 324, 328 (1973). "A plaintiff need only show 'that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.' " *Mullins* v. *Pine Manor College*, 389 Mass. 47, 58 (1983), quoting *McLaughlin* v. *Bernstein*, 356 Mass. 219, 226 (1969). It must be shown, however, that a defendant's negligent conduct is a "substantial factor" in bringing about harm to the plaintiff. Restatement (Second) of Torts § 431 (1965).

One theory of the plaintiff's case was that his knee had to be fused because of the delay in bringing him to the hospital. An expert witness testified at length about the complications created by that delay. The hospital records contain entries by two doctors indicating that the best method of correcting Johnson's comminuted fractures had to be postponed because

injuries, their severity, and the need for prompt medical care, and, hearing the plaintiff's repeated pleas for prompt medical attention, did nothing to aid him.

the delay in treatment made vascular repair "urgent." The necessity of treating the severed leg artery after such a delay, and the resulting complications of that treatment, therefore, prevented doctors from treating Johnson's fractured bones until several weeks had passed. By the time doctors were able to address the orthopedic damage, the bones in Johnson's leg had "healed in an abnormal position," and fusing the bones rather than repairing them was the only possible treatment.

The jury would have been warranted in inferring and finding that the defendants' failure to bring Johnson directly to a hospital increased the likelihood that his injuries would be exacerbated. The defendants' actions were not a minor ripple lost in a sea of competing causes, nor was the chain of causation so attenuated that, as a matter of law, the defendants' conduct could not have been a substantial factor in bringing about Johnson's harm. Restatement (Second) of Torts, *supra* § 433 comments a-f (factors to be considered in determining whether negligent conduct is substantial factor in producing harm). See Restatement (Second) of Torts, *supra* at § 501 (2), stating that misconduct in reckless disregard of another's safety is to be taken into account in determining whether a jury case on causation has been made out.

3. The defendants claim that they were improperly denied the qualified immunity available to § 1983 defendants. Although we doubt that this issue was properly raised below and thus preserved for appeal, we nonetheless address it because our answer has no effect on the result. Both parties have argued the issue here, and the plaintiff does not argue that the issue was waived. The defendants do not urge that the contours of the relevant Federal law were insufficiently clear so that a reasonable officer would not have understood that what the defendants did was in violation of the plaintiff's constitutional rights. See *Anderson* v. *Creighton*, 483 U.S. 635, 638-641 (1987); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Instead, the defendants rely on their adherence to the department's regulations which, they assert, absolved them of any responsibility for the plaintiff's care.

Summers and Nee might prevail on their immunity claim if they could "prove that [through 'extraordinary circumstances'] [they] neither knew nor should have known of the relevant legal standard." See *Harlow* v. *Fitzgerald*, *supra* at 819. There is some, though hardly unanimous, authority that the fact that an actor was following a superior's orders should be considered in determining whether a § 1983 defendant should be immunized from liability for the violation of a plaintiff's otherwise clear Federal rights. See 1 Schwartz, Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 9.16, at 527 n.450 (2d ed. 1991). We have already noted, however, that the jury could properly have viewed the department's regulations as placing no constraints on the ability of the defendants to provide prompt medical care. The defendants have not met their burden of proving extraordinary circumstances and are not entitled to qualified immunity from suit.

4. The defendants argue that the imposition of liability here would upset the effective functioning of vital law enforcement personnel. Concerns of that type have been addressed by the recognition of qualified immunity for such personnel (see *Anderson* v. *Creighton*, *supra* at 638) and by the high level of culpability which a § 1983 plaintiff must show before liability will be imposed. We are aware of no authority that would allow us to discover some additional Federal immunity in the name of public policy. In any event, we see no burden on legitimate law enforcement needs that will result from allowing the judgment below to stand.*

Judgment affirmed.

LYNCH, J. (dissenting, with whom Nolan and O'Connor, JJ., join). There is not a trace of evidence in the record sug-

*The defendants moved for a new trial as an alternative to their motion for the entry of judgment notwithstanding the verdict. They advance no separate argument concerning the denial of that motion. There was no error in its denial.

gesting that delay in providing medical care to the plaintiff caused him to be crippled. The evidence indicates only that by 3:18 A.M., when he finally arrived at the hospital, his condition was such that his orthopedic injuries could not be treated until much later which resulted in loss of function to his knee. Would the plaintiff's leg have healed more successfully if he had been taken to the hospital at 2 A.M.? At 1:30? Or was the medically significant delay the half hour between 12:30, when the defendants arrested the plaintiff, and 1 A.M., when the defendants went off duty and ceased to be responsible for the plaintiff's care? Or, indeed, would the result have been the same if the plaintiff had arrived at the hospital one minute after he was injured? The jury's answer amounts to a guess because the record contains no hint. Given the plaintiff's absolute failure to introduce any evidence establishing a causal link between the defendants' conduct and the plaintiff's worsened condition, the defendants were entitled to a directed verdict or judgment notwithstanding the verdict.

It is fundamental that the plaintiff bears the burden of establishing causation by a preponderance of the evidence. "If on all the evidence it is just as reasonable to suppose that the cause [of the plaintiff's injuries] is one for which no liability would attach to the defendant as one for which the defendant is liable, then a plaintiff fails to make out his case." *Alholm* v. *Wareham*, 371 Mass. 621, 627 (1976), quoting *Bigwood* v. *Boston & N. St. Ry.*, 209 Mass. 345, 348 (1911).

The plaintiff cannot escape a directed verdict or judgment notwithstanding the verdict if no view of the evidence supports a verdict in his favor. See *Stapleton* v. *Macchi*, 401 Mass. 725, 728 (1988).[1] Although we indulge every inference to his advantage, *Wilson* v. *Honeywell, Inc.*, 409 Mass. 803, 804 (1991), the plaintiff is nonetheless required to establish the essential elements of his claim "either by direct evidence or rational inference of probabilities from established facts."

[1]The standards governing motions for directed verdict and judgment notwithstanding the verdict are the same. *Stapleton* v. *Macchi*, 401 Mass. 725, 728 n.5 (1988).

Zezuski v. *Jenny Mfg. Co.*, 363 Mass. 324, 329 (1973), quoting *Bigwood*, *supra*. Inferences drawn from the evidence must be based on probabilities, not possibilities. *Gram* v. *Liberty Mut. Ins. Co.*, 384 Mass. 659, 664 (1981). *Alholm*, *supra*. That is, inferences may not be drawn "from the realm of mere speculation and conjecture." *Id.* Contrary to this standard, today's ruling endorses an attenuated inference lacking an essential factual predicate.

The court states that "[a]n expert witness testified at length about the complications created by that delay," that is, "the delay in bringing [the plaintiff] to the hospital." *Ante* at 88. The expert explained that the defendant suffered fractured and dislocated bones in and near his knee and a severed artery when he fell down the two sets of stairs. He testified that the necessity of treating the severed artery immediately and complications in treating the plaintiff's open wounds led the doctors to postpone addressing the orthopedic damage in his knee.[3] According to the expert, by August 25, 1981, one month after the incident, the bones had fused in a "malunion," which prevented the doctors from restoring the

[3]The expert testimony on which the plaintiff and presumably the court relies recounted the treatment the plaintiff received on the day of the incident. He noted that the popliteal artery, the major artery carrying blood to the lower leg, had been severed. He continued, "[O]n an emergency basis, [the plaintiff] was immediately taken to the operating room to have [the artery] repaired." When asked how the doctors treated a broken bone at this point, the expert responded, "Well, there are several things wrong that were emergencies, even over and above the broken tibia. Once the artery is repaired, blood flow is restored to the leg." Once the doctors treated swelling that resulted from the restoration of blood flow to the leg, the expert said, "the vascular surgeons, in consultation with the orthopedic surgeon . . . decided that any further operative repair or attempt to repair of the tibia bone would seriously affect the artery, and, in fact, might disrupt the flow of the artery. So, at that point, they did something which is also standard practice in orthopedics. They placed a pin through the upper tibia. So, we take a pin and put it through the bone, and we put the person in traction. . . . [T]hey had restored blood flow to the leg. Essentially, nothing had been done with his fractures at that point, other than traction."

knee surgically.[3] On October 19, 1981, doctors operated on the knee, joining the femur (thigh bone) and tibia (a shin bone) in a fixed position, essentially eliminating the knee joint.

In sum, the expert opined only that at 3:18 A.M. it was necessary to delay treatment of the plaintiff's fractured bones. The hospital records admitted in evidence add nothing more.[4] Nowhere in the expert's testimony is there a statement, either express or implied, that the procedure followed at the hospital, or the result, would have been different had the plaintiff been brought to the hospital immediately after he sustained his injuries. Although one may infer that the plaintiff would have obtained medical care sooner if the defendants had taken him directly to the hospital, there was no evidence to suggest that the treatment rendered at that unknown earlier time would have been any more effective. Surely the testimony that complications arose from the fact that his blood supply had not been restored for at least eight hours does not imply that lack of blood flow for five or six hours would not have led to the same conditions.

Furthermore, even if we assume, for purposes of analysis, that the three hours before the plaintiff's arrival at the hospital were medically significant, the evidence still is critically lacking. The plaintiff failed to offer *any* evidence suggesting

[3]The doctor testified, "At that point [August 25, 1981], the bones are fused together enough that we consider it a malunion. What that means is the bones have healed in an abnormal position, and open reduction and internal fixation is no longer a viable option."

[4]The hospital records contain two relevant notations, both dated July 21, 1981. First, the chief resident noted, "ORIF [open reduction and internal fixation, i.e., orthopedic surgery] would give best result but ischemic time makes vascular repair urgent." A second doctor stated, in a postoperative report: "Because of the previous 8 hour ischemic time to the leg, it was felt that an additional 3 hour procedure to reconstruct the tibial plateaus in this patient was not indicated at this time." These notations do not address the decisive issue: Would doctors have achieved a better result if the ischemic time had been briefer? Furthermore it should be noted that the plaintiff's expert attached no significance to these notes. Nothing suggests that this medical expert construed those notes in the way the court says the inexpert jury fairly could have construed them.

that the period of delay for which the defendants were arguably responsible, from 12:30 to 1 A.M., caused the plaintiff's condition to worsen. Remarkably, this reduces to irrelevance the question whether the delay that occurred while the plaintiff remained in the defendants' custody was medically costly.

With due respect, I, therefore, dissent.

APPENDIX B

BOSTON POLICE RULE NO. 318

RULES AND REGULATIONS PRISONERS AMENDED

Sections 1-6

JANUARY 16, 1981

This rule is issued to establish guidelines for the care and treatment of prisoners, including persons held in protective custody, (Rule No. 318-A). It replaces Rule No. 40 of the 1950 Manual and supersedes all previously issued directives concerning the processing, safekeeping and treatment of prisoners in the custody of members of this Department and at the House of Dentention.

GENERAL CONSIDERATIONS: Prisoners and suspects shall be treated in a fair and humane manner, and the rights to which they are entitled shall be respected.

Sec. 1 Except when otherwise ordered or allowed, every person arrested shall be taken at once to the station house of the District within which such person was arrested, where a Department Arrest Form shall be completed promptly by the booking officer.
The name, address, age, date-of-birth, if obtainable, of every person arrested shall be telephoned to the Operations Division as soon as is practicable, where a booking number will be obtained. This number will be used on the Arrest Form.

Sec. 2 Arrest information received at the Operations Division will be recorded, the segregated files searched, to learn whether or not the arrested person is wanted for a crime, or for questioning in connection with a crime, and the arrest shall be indexed.

Sec. 3 All persons arrested for felonies or other serious crimes, including sex offenders and those charged with violations of the gaming or narcotic drug laws, shall be sent to the Identification Section to be fingerprinted and photographed. At the discretion of the Duty Supervisor any other prisoner may be fingerprinted and photographed.

Sec. 4 Prisoners transported from station houses to headquarters, or other places, for detention, identification, or any purpose whatsoever, shall be guarded by a sufficient number of Patrol Officers, or Officers of rank, and shall be restrained in accordance with Department Rule No. 315, *Handcuffs*, individually, or to other prisoners. Handcuffs shall be removed only to facilitate fingerprinting, writing on forms, or when otherwise absolutely necessary.

Sec. 5 Officers having prisoners in their custody shall be held strictly responsible for the safe custody of the prisoners under their care and this responsibility is theirs at all times.

Sec. 6 When a prisoner has been arrested, with or without a warrant, and the required Department Arrest Form has been completed, in a District other than the District wherein the warrant was obtained, or the crime committed, the prisoner shall be surrendered to the District holding the warrant or wherein the crime was committed.

Sec. 7 All persons taken to a station house under arrest shall be placed before the officer designated by the Duty Supervisor as the Booking Officer. The Booking Officer shall insure that a Department Arrest Form is properly completed for each prisoner.

Sec. 8 The Duty Supervisor shall be responsible for making an examination, and a Visible Injury Report if neces-

sary, for cuts, bruises or injuries of a prisoner at the time of booking, as required by G.L. Ter.Ed., C. 276, S. 33.

The Duty Supervisor shall designate an officer who shall be responsible for removal of all personal property from the prisoner booked. The Duty Supervisor shall be responsible for insuring that such personal property is properly inventoried and that belts, neckties, boots, shoes, or laces, and all other articles which might be used for suicidal purposes by the person under arrest and confined in a cell, are taken from the prisoner.

Sec. 9 The Duty Supervisor shall insure that all money and other property taken from a prisoner under arrest shall be placed in a prisoner's effects envelope and that the property is safeguarded in accordance with Department policy and regulations.

When a prisoner is being surrendered to another District, or other law enforcement agency, the prisoner's property shall be handed over to the officer responsible for transporting the prisoner. The transporting officer shall sign a receipt for such property and the receipt shall be promptly stapled into the District receipt book.

The transporting officer shall deliver the prisoner's property to the booking officer at the receiving District, or agency, who shall care for the prisoner's property in accordance with the provisions of this Rule.

Sec. 10 The Duty Supervisor at a station house who receives a prisoner previously booked at another Boston Police facility shall insure that belts, neckties, boots, shoes, or laces, and all other articles which might be used for suicidal purposes, are taken from the prisoner. He shall also insure that an examination, and a Visible Injury Report, if necessary, are completed.

In addition, the Booking Officer shall complete a supplemental Arrest Form and attach it to the orange colored copy of the original Arrest Form. The Supplemental Arrest Form shall consist of the white copy of Department Form No. 2.1, (Arrest Booking Sheet). The Booking Officer at the receiving facility shall fill out blocks numbered 1 through 7, and numbers 39 through 54, and then staple the white copy of the Form to the orange colored copy of the original Arrest Form. The word "Supplemental", shall be written or typed in the upper right corner of the white supplemental form.

Sec. 11 When a person in custody is found to be suffering from wounds or injuries, which in the judgement of the Officer in Charge, require medical attention, he may be sent to a hospital, or a physician may be called. If the physician shall so advise, the person shall not be held at the place of confinement, but shall be sent to a hospital; and while in the hospital, such person, if under arrest, shall be in the legal custody of the police.

If wounds or injuries of a prisoner appear to have been inflicted by the arresting officer(s), the Officer in Charge shall record the fact on the Arrest Form and notify the Commanding Officer. The Commanding Officer shall forthwith inquire into the circumstances of the case, and if it shall appear that unnecessary force was used, he shall prefer charges against the offender(s), and make a full and complete report to the Police Commissioner.

Sec. 12 Whenever, in the opinion of the Officer in Charge of a District station house, or other place of detention, a person held in police custody shows indications that

he may attempt to commit suicide, by reason of being extremely depressed, anxious, or by other outward indications that he may commit suicide, such Superior Officer shall be responsible for taking all reasonable precautions to prevent an individual from attempting to commit suicide.

The Duty Supervisor shall immediately insure that the prisoner is closely monitored. The Duty Supervisor shall then notify the Duty Supervisor at the Operations Sector at Police Headquarters who shall dispatch appropriate medical personnel to the scene to make an evaluation as to whether medical treatment is required, or whether the prisoner should be hospitalized. If such medical assistance is unavailable, the Duty Supervisor shall have the prisoner transported to a suitable hospital, accompanied by police officers, where a determination can be made as to whether he is suicidal.

Department personnel receiving prisoners should familiarize themselves with any information provided by the Department concerning the past history of individuals who may come into their custody.

Sec. 13 Duty Supervisors shall insure that cells which contain stainless steel mesh are utilized whenever possible for persons held in custody. Such cells shall be used before a person is placed in a cell which does not have such mesh.

Whenever a mesh-screened cell is vacated and there is a person confined in a cell without such mesh, the prisoner in the cell without mesh shall be transferred to the cell which has such mesh.

NOTE: In the event that it may be deemed inadvisable to place a person held in custody in a screened cell, it shall be the responsibility of the Duty Super-

visor to notify the Bureau of Field Services, specifying the reason for such non-detention. During the hours when the Bureau of Field Services is closed, a Superior Officer on duty at the Operations Division shall be notified and he shall submit a report to the Bureau of Field Services.

Sec. 14 Whenever police officers assist a sidk or injured person, or a prisoner, to a hospital a memorandum, in duplicate, of the money, valuables or other property taken from the person so assisted, when searched at the hospital, will be made by the hospital attendant who made the search. One copy shall be signed by the officer who assisted the person to the hospital, and left with the attendant, provided the officer was present when the search was made; the other copy shall be delivered by the officer to his Commanding Officer, who shall enter it into the District or Unit Receipt Book.

Sec. 15 Prisoners who are not bailed shall be placed in cells, no more force being used than is necessary to overcome resistance.

Sec. 16 When a prisoner is unconscious for any cause, the Officer in Charge shall immediately endeavor to restore consciousness and summons medical assistance. Any unusual appearance displayed by a prisoner shall receive immediate attention.

Sec. 17 The Officer in Charge of a station house wherein a person is held in custody shall permit the use of the telephone for the purpose of allowing the person in custody to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney.

Sec. 18 No member of the force or employee of the Department shall accept a fee for rendering any services to

persons in custody; nor shall any member or employee receive any money or any valuable thing from a prisoner for any purpose whatever, without the knowledge and consent of the Officer in Charge.

Sec. 19 Prisoners shall be made as comfortable as possible. They shall be supplied with clean water to drink. Necessary food shall be purchased for prisoners, and bills, for such food, properly vouched for, shall be forwarded monthly.

Prisoners shall not be allowed to receive food or drink other than that which is supplied to this Department by authorized vendors (except for water).

Sec. 20 No person, except the Police Commissioner, an Officer above the rank of Captain, or a person authorized by one of them, or an attorney whose services have been engaged, shall visit or converse with a prisoner except in the presence and hearing of the Officer in Charge, or a police officer assigned by him.

Sec. 21 The Officer in Charge of a Police Facility may restrict visitations by friends and relatives to persons in custody, subject to the availability of personnel, and the needs of the Department.

Sec. 22 Properly prescribed medicines, found to be in a prisoner's possession, shall be taken into custody. If the person in custody so requests, the Officer in Charge shall allow a proper dosage, as prescribed on the medicine label, to be given to the prisoner. Dosages, and their frequency of ingestion, shall not exceed the limitations setforth on the medicine container. Each dose issued shall be recorded in Box #54 of the Prisoner's Arrest Form, by the officer issuing the medicine.

Sec. 23 Officers in Charge, and at the House of Detention, the Matron in Charge, shall visit, or cause to be visited, all persons in their custody, at least once every

twenty minutes during the day and night, and shall insure that each visit is recorded in the required Department Book, Form No. 2069, *Prisoner Inspection Record*.

Sec. 24 Police Officers shall not recommend to prisoners or others the employment of any specified person as attorney or counsel, nor shall they furnish the names of persons as bondsmen or be concerned in matters of bail, otherwise than as prescribed in the Department Rule No. 321, "Bail and Bail Commissioners."

Sec. 25 When a prisoner has retained counsel he shall be allowed to consult with his counsel in a secured area, within sight of, but not within hearing of, the Officer in Charge or a Police Officer assigned by him.

Sec. 26 Persons arrested while the Municipal Court or District Courts are in session who are in a fit condition to be tried shall be taken before said Courts; but if not in a fit condition to be tried, such persons shall be detained until they are in a fit condition, unless otherwise lawfully disposed of.

Sec. 27 Commanding Officers shall take measures to insure the attendance of complainants and witnesses in all cases. Prisoners shall not be transported in vans in excess of the seating capacity. When necessary, extra trips of the vans shall be made and prisoners awaiting transportation shall be returned to cells.

Sec. 28 Whenever a person in the custody of the Police Department has apparently committed suicide, the Duty Supervisor shall notify the Operations Division *immediately*. A Superior Officer of the Operations Division shall be notified and he shall notify the Medical Examiner and the Internal Affairs Division. In the event that a person in the custody of the Police Department has apparently attempted to commit

suicide the Duty Supervisor shall insure that the Internal Affairs Division is notified.

Sec. 29 If a person who is either under their care or in custody should appear to be in immediate danger of dying, the police will call, as promptly as possible, a clergyman of any faith designated by him. Should he be unconscious or unable for other reason to express a wish, and should the police, through personal knowledge or information, or because of his apparent race, or the presence of religious emblems. consider it reasonable to believe that he is of a particular faith, they shall call a clergyman of that faith. This is a work of charity which all members of the force should perform.

Sec. 30 When examining prisoners by question or otherwise for the purpose of obtaining information, no officer shall infringe upon their legal rights, nor should he subject them to any pressure or procedure of which he would be unwilling to inform a Court in a hearing of the case.

Sec. 31 Officers shall insure that no prisoner is transferred from a station to the House of Detention, a Court, or elsewhere, who is not decently clothed.

Sec. 32 No prisoner under seventeen years of age shall be carried in a vehicle which is occupied at the same time by a prisoner or prisoners above that age. In emergencies, or when a prisoner under seventeen years of age has been arrested in the company of an older person or for complicity in the same offense, such prisoner may be carried in the same vehicle with persons above seventeen years of age, provided a Police Officer accompanies them in the vehicle.

Sec. 33 When an agent of a society having statutory authority in the matter of neglected children offers to provide a vehicle for the purpose of transferring such children

from their homes to police stations or elsewhere under orders of the Courts and complaints by the society, such children as are alleged to be neglected, District Commanders, in accordance with the provisions of the law, will accept the offer and in each case will have a clear understanding with the agent as to the time and place at which the vehicle is to be ready.

Sec. 34 When an individual, who appears to be intoxicated, is taken into police custody and is found to be under the legal age at which alcoholic beverages may be bought the officer in charge of the case shall endeavor by all proper means to ascertain the place or places at which the minor obtained the liquor. A report of the results of the inquiry shall be made through channels to the Police Commissioner.

Sec. 35 All female prisoners, after being booked, in accordance with the Rules and Procedures of the Department, shall be sent as soon as possible to the House of Detention in a Department vehicle, except:

A. When immediate medical attention is required they shall be taken to a hospital.

B. When the condition of a female prisoner is such as to require the attention of a physician, the physicians' directions shall be obeyed.

Sec. 36 When a thorough search of a female is deemed necessary, the prisoner shall be transported to the House of Detention and delivered to a matron for that purpose, if a female Patrol Officer is not available.

Sec. 37 Female prisoners under arrest and in the custody of officers while being transported to the House of Detention shall be kept under close observation until they are delivered to a matron.

Sec. 38 Under no circumstances shall male and female prisoners be transported together to or from a Court in a van or other vehicle.

Sec. 39 All personal property taken from a female prisoner at a station house or at headquarters, in accordance with Department Rules and Procedures, shall be placed in a Prisoner's Property Envelope, and the Form shal lbe filled out by the Officer in Charge. The Officer in Charge shall hand the envelope to the officer accompanying the prisoner to the House of Detention, for delivery to the matron for safekeeping, until the property is restored to the owner. The matron shall examine the contents of the envelope and then give a receipt to the officer for the property received. The officer shall deliver the receipt to the Officer in Charge of his District or Unit, who shall staple the receipt into the District or Unit receipt book.

Sec. 40 Any article taken from a female prisoner when she is booked at a station house in accordance with the Rules and Procedures, which may be regarded as evidence, shall be handled as provided under the Rule concerning Evidence, and retained for presentation in Court.

Sec. 41 Female prisoners in police custody should not be confined in a cell within a cell-block at any station house or at headquarters. Whenever the temporary detention of a female prisoner is necessary, she shall be placed in a detention room when one is available, or in a secured room, or be held under guard in a public room.

Joseph M. Jordan
Police Commissioner

NOTE: Rule No. 318, promulgated in April, 1980, was revised in December 1980, and several new sections were added. All personnel should be aware of changes now in effect, especially Sections 7 through 23, and Section 41, concerning the methods of handling persons in custody.

APPENDIX C

13161 11509514 7-21-81 12:40 p.m.

Booking Charges: B&E Night Time

Location of Arrest: 413 Geneva Ave. Apt 2.

Name: Johnson, Willie L.

Address: 15 Ferndale St. DOR

Sex: M — Race: B — Age: 33 — DOB: 2-23-48 —

Place of Birth: So. Carolina

Parents' First Names: James, Jessie

Mother's Maiden Name: Doctor

Height: 5 10 — Weight: 175 — Hair: Blk — Eyes: Brn

Build: Med. — Complexion: Med.

Occupation: Hospital Soc. Sec. No.: 244 69 9269

Lic. No.: 244 69 9269

Arresting Officer: PO Summers & Nee I.D. No.: 6441

Partner I.D. No.: 7856

Transported By:

Booking Off: Sgt. Robert Kennett ID. No. 5641 at 12:57 a.m.

Searched By: PO Summers ID. No. 6441

Arrest Process: No Warrant

Signature: REFUSED TO SIGN

Visible Injuries: Left Cheek, Right Leg, Admitted at BCH

Property: Keys, Wallett, Lottery Receipts

Money: $14.48